BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

MUDGE, PANESKO, ZIESKE, et al., Petitioners, v. LEWIS COUNTY, Respondent	No. 01-2-0010c ORDER ON RECONSIDERATION
VINCE PANESKO et al., Petitioners, v. LEWIS COUNTY, Respondent, and LEWIS COUNTY ECONOMIC DEVELOPMENT COUNCIL & INDUSTRIAL LANDS ADVISORY TASK FORCE, Intervenors	No. 00-2-0031c ORDER ON RECONSIDERATION
EUGENE BUTLER, et al., Petitioners, v.	No. 99-2-0027c ORDER ON RECONSIDERATION

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LEWIS COUNTY, Respondent, and CITY OF CENTRALIA, et al., Intervenors	)	
DANIEL SMITH, et al., VINCE PANESKO, and JOHN T. MUDGE, Petitioners, v. LEWIS COUNTY, Respondent, and CITY OF CHEHALIS, CITY OF NAPAVINE, and PORT OF CHEHALIS, Intervenors	)	No. 98-2-0011c ORDER ON RECONSIDERATION

On July 10, 2002, we issued a compliance order (CO) in the above-entitled cases. On July 22, 2002, we received a motion for reconsideration from Petitioner Panesko, and a motion for reconsideration from Petitioners Butler, et al. On July 30, 2002, we received a response from Lewis County and Economic Development Council (EDC).

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We have reviewed the written materials and the supporting record citations set forth by the parties. We decline to reconsider our decision as to the SEPA finding, the public participation finding, and the transportation element since the arguments presented were the same as those previously submitted for the compliance order (CO) proceeding. We treat Petitioners Butlers' request for "clarification" as a motion for reconsideration.

Petitioners Panesko and Butler complained that we ignored the March 5, 2001 decision that found a failure to comply because of the County's failure to require annual amendments of its development regulations (DRs) to be reviewed at the same time as the comprehensive plan (CP) amendments. Although not addressed specifically in the CO of July 10, 2002, we did discuss the application of LCC 17.15 in the context of the public participation program. Section .060 directs that amendment of DRs that implement the CP will be processed concurrently with CP amendments. Petitioners were unable to prove that the Growth Management Act (GMA, Act) was violated.

Petitioner Panesko's discussion of reconsideration of rural lands, including the urban growth definition, clusters, and limited areas of more intensive rural development (LAMIRDs), proceeds on a fundamentally incorrect basis, i.e. that the County bears the burden of showing compliance. We addressed this issue in the CO, but reiterate and synthesize what is clearly set forth in the GMA; local governments never have the burden of showing compliance. The only burden of proof that exists for a local government is to remove substantial interference such that a prior determination of invalidity might be rescinded. Succinctly stated, in this case Panesko did not show a violation of the GMA with regard to rural issues of variety, character, and visual compatibility.

Panesko also asked that we reconsider the decision as to the Curtis LAMIRD and the use of RCW 36.75.365 "to clarify why the concept of unlimited expansion using back-to-back industrial designations via .365 is acceptable at the Curtis Pole Yard or any location in Lewis

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County." The answer is simple. The Legislature provided for this process as long as the requirements set forth in the GMA are met. It is not our role to somehow decide the Legislature was incorrect in adopting those provisions.

Although not directly argued in the County's response, the record was abundantly clear that the Toledo Airport LAMIRD was substantially reduced as required by the GMA and in line with the previously imposed determination of invalidity. It was not the text of LCC 17.75 which was the difficulty, but rather the size of the logical outer boundary (LOB) that was the impetus for a finding of noncompliance and determination of invalidity. Once that LOB was reduced to the eight acres, as set forth in the record, the County met its burden of showing an absence of substantial interference with the goals of the Act. Petitioners did not meet their burden of showing a failure to comply with the GMA.

Petitioners Butler make many of the same arguments as Panesko. Again, these petitioners premise much of their arguments on the fundamentally flawed misunderstanding of the nature of a compliance hearing and subsequent decision. At p. 5 of petitioners' motion, the following is set forth:

> "In effect, the Hearings Board ruled that, despite the fact that the issues were resolved in its March 5, 2001 FDO, the *petitioners had the burden of again reestablishing the County's non-compliance.* The County was thus afforded the opportunity to re-litigate issues that have previously been resolved. Fundamental principles of *stare decisis, res judicata,* and *collateral estoppel* are designed to provide finality and the ability of affected parties to rely on prior litigation as resolving such issues." (Emphasis supplied)

There is nothing in the GMA to suggest that a hearings board has the authority to resolve equitable issues such as *res judicata* or *collateral estoppel*. In fact the entire scheme of the GMA, upon an initial finding of noncompliance, is for the local government to review the areas of noncompliance along with the reasons therefore and include in the record the steps and materials used to subsequently achieve compliance. We have always held that the ultimate

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decision in a compliance hearing is compliance with the GMA, whether or not that action necessarily involves strict adherence to the provisions of the order determining noncompliance. The Legislature has made it abundantly clear in RCW 36.70A.320(2) that those who challenge the local government's actions during the remand period have the burden of proving, under the clearly erroneous standard, that the results fail to comply with the Act. In this case, petitioners failed to sustain that burden in most instances.

Another problem with the arguments by Petitioners Butler is their failure to look at the remand actions of the County as a whole. While it is true, as pointed out by Butler, that some sections of the Lewis County Code (LCC) such as 17.100.100 have previously been found both noncompliant and invalid, the subsequent remand actions of the County have removed and significantly changed the basis for those findings. Contrary to the assertions of Butler, the County has changed many portions of its CP and DRs in the subject matter of both rural character and rural uses. Contrary to the situation involved in the March 5, 2001 FDO, the County no longer uses a uniform 1-5 lot size and did actually consider and analyze rural character including visual compatibility and lot size diversity. The County appropriately reduced the LOBs of its .070(5)(d)(i) LAMIRDs. It did not create "new" type (i) LAMIRDs, but analyzed the ones that were in existence on July 1, 1993. Petitioners did not present adequate proof that these re-analyzed LAMIRDs fail to comply with the Act.

While we agree that a more clearly defined separation between types (ii) and (iii) LAMIRDs and other rural uses would have been preferable, once again, petitioners did not present sufficient proof to show that the County's approach fails to comply with the Act. Under the GMA there are limited opportunities to create "new" types (ii) and (iii) LAMIRDs.

As to the Centralia industrial land bank (ILB), petitioners misread the decision, particularly in the context of the appended findings. The major difficulty with the Centralia ILB was the establishment of the "reserve area" which was removed during the remand period.

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Additionally, the Legislature has changed the timeframe for completion of the Master Plan under RCW 36.70A.365 by its extension for a period of five years. At the time this issue was originally considered, the timeframe for completing the Master Plan had expired. At the time of the compliance hearing the County conceded that the I5/US12 ILB did not comply with the Act. In so far as the same considerations apply to the Centralia ILB, we agree with Petitioners Butler that noncompliance also applies to that ILB designation upon the basis that the Master Plan has not yet been completed.

The Skye Village noncompliance and invalidity was resolved by the County's withdrawal of the designation. That was the extent of the CO.

We addressed the "Public Aviation" issue that was presented for the compliance hearing. Any additional issues would be resolved at the hearing from the new petitions for review (PFR) filed by Petitioners Butler.

The issues presented concerning non-conforming uses, did not involve the potential conflict between LCC 17.155.040 and LCC 17.42.040. Those issues are appropriately resolved in the subsequent PFR hearing. The same can be said for the requests from Petitioners Butler as to "junkyards" and "density bonus."

At pg. 14 of the Petitioners Butler brief, they "reserve the right to move for a reconsideration on any issues addressed in a Clarification Order." No such right exists, nor can it be created by a unilateral "reservation." There is no provision in our rules for reconsideration of the reconsideration order. It is final.

WHN Personal Note: My thanks to all of you who participated in these hearings over the past ten years. Thanks also to Les Eldridge and Nan Henriksen for being the best colleagues a

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person could hope for and to Governors Gardner and Lowry for allowing me this opportunity. This has been an experience that I will always cherish.

This is a Final Order under RCW 36.70A.300(5) for purposes of appeal.

So ORDERED this 19th day of August, 2002.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

_____
William H. Nielsen
Board Member

_____
Nan A. Henriksen
Board Member

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Les Eldridge
Board Member

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